BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The United States Circuit Court of Appeals for the Fourth Circuit rendered its original opinion on the first appeal in this case on April 11, 1944. The opinion is reported in 142 Fed. (2d) 824 and is set forth on pages 1 to 7 of the Record. Subsequently, a petition for rehearing having been filed, the Circuit Court rendered its supplemental opinion on May 31, 1944 denying the petition. The opinion is reported in 1942 Fed. (2d) 828 and is set forth on pages 8 to 9 of the Record.

The Circuit Court rendered its opinion on the second appeal in this case on October 30, 1945. The opinion is set forth on pages 91 to 94 of the Record, and has not been reported.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fourth Circuit on October 30, 1945. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911 c. 231, §240, 36 Stat. 1157 as Amended February 13, 1925, c. 229, §1, Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented, see pages 1 through 8 above.

Specification of Errors.

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In affirming the judgment of The Tax Court of the United States in this cause.

2. In not reversing the judgment of The Tax Court of the United States in this cause.

3. In finding that the future interests owned by petitioner, a part of which were transferred by petitioner into trust, were of such a computable or ascertainable value as to be subject to the gift tax under the Revenue Act of 1932 as Amended.

4. In not finding that the future interests owned by petitioner, a part of which were transferred into trust by petitioner for the benefit of his children, were without computable or ascertainable value in the donor's (and donees') hands by any actuarial or other recognized method, as stipulated by the Commissioner of Internal Revenue in The Tax Court of the United States, and were therefore not subject to gift tax.

ARGUMENT.

Frederic W. Procter, "an improvident son of an indulgent mother," gave his two children, Billy and Patricia, on January 13, 1939, property which *would then have been* "actuarially worth" to him between $165,016.95 and $166,400.58, *except* that he *would only become* the owner of such property *PROVIDED*:

1. That Lillian S. Procter, his mother, left no other children than Frederic W. Procter on her death; and
2. That Mrs. Procter did not foreclose and sell her son's property to someone else under the power contained in his $686,300.03 promissory notes, before her son should ever receive it.

The Commissioner of Internal Revenue *STIPULATED* that the conditions attached to the above ownership made it an IMPOSSIBILITY to value the property in the donor's hands subject to these conditions. See pages 75-6 and 92-3 of the Transcript.

The Circuit Court of Appeals for the Fourth Circuit affirmed the Tax Court's finding that the donor must pay a gift tax on a gift of a part of such property *even though the value thereof to the donor could not be ascertained by any known means.* The basis of the Circuit Court's opinion was, however (R. 94), that "the value of the gift was susceptible of computation," in spite of the *stipulation of fact* by the Commissioner of Internal Revenue in The Tax Court *diametrically to the contrary* that the value of the property given was *not* susceptible of computation (R. 76, 93).

An examination of all three of the Circuit Court's opinions fails to show any reason why a gift tax could properly be levied in this case except upon the theory expressed by the Circuit Court itself, *i.e.*, "that the value of the gift was susceptible of computation". But the Circuit Court utterly fails to show in its opinions how a gift can have a "value susceptible of computation" in the face of the fact that the Commissioner of Internal Revenue has himself signed and filed in the Tax Court by his attorneys a *stipulation of fact* squarely stating that the property in the hands of the donor a part of which is the subject of the gift in this case had no "value" which was susceptible of computation (R. 76, 93).

The question of whether property has a value is a question of fact, not a question of law. A value to be susceptible of computation must be so susceptible in fact. No mere legal argument can ever been adduced to prove any such susceptibility to valuation *in fact*. The Commissioner was necessarily compelled to stipulate that there was no such susceptibility to valuation *in fact* in this case. How, then, can the Circuit Court rest its affirmance of the Tax Court's decision upon any such finding of fact *when the Commissioner has himself stipulated that no such fact exists?* As this Court clearly stated in the case of *Robinette* v. *Helvering*, 318 U. S. 184, in the language of Mr. Justice Black, there are limits to the powers of courts to place a "value" upon property. In that case the donor owned the property outright and conveyed it to her issue provided (1) that she married; (2) that she had children; and (3) that the children lived to the age of 21 years. Judge Black said:

> "Actuarial science may have made great strides in appraising the value of that which seems to be unap-

raisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question."

In the *Robinette* case, since the donor owned the property given outright, it was quite properly held that the gift tax should be levied upon the whole property transferred, and that such value should not be cut down by the fact that the contingencies imposed voluntarily by the donor rendered the property of no computable or ascertainable value in the hands of the donee.

Certainly *the same principle* should be applicable to a case such as this in which the property has no computable or ascertainable value *in the hands of the donor;* and this is in full conformity with Section 506 of the Revenue Act of 1932 as Amended.

We are not here dealing with what *criterion of value* should be employed for determining the "value" of gift property under the Revenue Act. That, as this Court has said in *Powers* v. *Commissioner,* 312 U. S. 259, is a question of law. But where there is no valuation of the property in the donor's hands possible at all, which is the stipulated fact in this case, then Section 506 of the Act is not applicable at all. For this Section provides:

> "If the gift is made in property, the *value* thereof at the date of the gift *shall be considered the amount of the gift"* (26 U. S. C. A., Sec. 1005) (Italics added).

Thus if the property in the donor's hands has, as a matter of fact, no "value," the gift has no "amount," and the tax fails.

Both Treasury Regulations 79, Art. 19(1), promulgated October 30, 1933, and Treasury Regulations 108, Sec. 86.19*

* See Appendix at page 17 below.

state that the "value" of gifts of property as the word is used in the Act means "the price" at which the property would "change hands" between a willing buyer and a willing seller. But of course property which in fact has no "value" at all (which is the fact in this case) can have no "price" within the meaning of the Act or the Regulations; for, as this Court held in *Guggenheim* v. *Rasquin*, 312 U. S. 254, the Regulations cannot change the meaning of the word "value" in the Act itself.

There would appear to be no escape from the foregoing conclusion. It surely cannot be held that the Commissioner's stipulation of fact filed in the Tax Court can later be disregarded by the Circuit Court to the disadvantage of the taxpayer who relied thereon in the Tax Court.

It surely cannot be maintained that a gift of property which has *no actual value in fact* to the donor is subject to the gift tax at *a fictitious value which is not its true or actual value in fact as determined by some actuarial or other recognized method.*

It surely cannot be maintained that the Commissioner's letter of determination of value is *prima facie* valid, when the Commissioner has himself *stipulated to facts inconsistent therewith.*

Under the *Robinette* case, if Mr. Procter had *owned outright* $165,000 of securities and had made a conditional gift thereof to his children, it would follow that he would be properly subject to the gift tax on the amount of $165,000, even though the conditions voluntarily imposed by him upon the gift rendered its value to the donees but not to him of an indeterminate and unascertainable amount.

But in this case the taxpayer gave away, not property which was owned outright by himself, but part of certain future interests *which he himself had only a conditional right to receive;* and it was such *conditional* receipt by him which rendered its valuation *in his hands* an impossibility in fact, as the Commissioner stipulated. It is important to note that *in the very language of the Trust Indenture itself* the taxpayer only transferred, assigned and conveyed "*so much* of all his right, title and interest in and to the trust fund and remainder created by" said *inter vivos* and testamentary trusts "as *will remain* (a) after the satisfaction and payment of the indebtedness to Lillian S. Procter represented by the aforementioned seven notes" given by him to his mother totalling $686,300.00 (R. 24).

In other words, the taxpayer clearly had only a *possible right* to receive an interest in the remainders under his grandfather's trusts, but this property owned by him was not susceptible to valuation in his hands as required by Section 506 of the Act imposing the gift tax. Under Section 506 of the Act, the Federal Congress plainly said that the "value" of the "property" "shall be considered the amount of the gift." Therefore, when the property given is without "value" there can be no "amount of the gift" within the language of Section 506; and since there is neither value nor amount within the meaning of the Act there is no gift tax.

Conclusion.

A petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in this case is herefore respectfully prayed, to the end that the judgments of the Circuit Court and of The Tax Court of the United States may be reversed.

Respectfully submitted,

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